IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.2246 OF 2004

Shri Gulam Reza Hadi Tafti .... Petitioner
Vs.
Shri Tatyaba Ramrao Zambre
& Ors. .... Respondents

Shri J.S. Kini for the Petitioner.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: APRIL 10, 2006

ORAL ORDER:

1. Heard. The petitioner challenges the order dated 19-9-2003 passed by the Small Causes Court, Pune under Exhibit-48 in Regular Execution Application No.44 of 2002. The Exhibit-48 was an application for condonation of delay in filing the execution proceedings. The trial Court has dismissed the said application on the ground that the decree which was sought to be executed is primarily for mandatory injunction and the provisions of Section 5 of the Limitation Act, 1963 are not applicable to such proceedings.

2. The trial Court by its judgment and decree dated 4-2-1980 partly decreed the suit filed by the petitioner. The trial Court refused the relief of injunction for removal of the lock on the northern gate as well as for removal of the shed occupying an area of

15 x 20 feet though it granted the relief in the nature of removal of the corrugated iron sheets which were put up by the respondents on the stretch of the land of the width of 10 feet, situated on the rear side of the residential premises of the petitioner as also permanent injunction in favour of the petitioner and against the respondents in relation to the said stretch of land. Being dissatisfied by the rejection of the relief in the nature of mandatory injunction for removal of shed and the said lock, the matter was carried in appeal by the petitioner and the first Appellate Court by its judgment and decree dated 18-11-1981 allowed the appeal and granted the relief of mandatory injunction by directing the respondents to remove the shed of 15 x 20 feet erected by him on the open land comprised in the lease and further ordered to remove forthwith his lock to the northern gate in the compound of the premises and to refrain from obstructing the use thereof by the petitioner.

3. Bare reading of the decrees passed by the trial Court as well as by the lower Appellate Court, it is apparent that the relief which has been granted to the petitioner was essentially in the nature of mandatory injunction and with further relief of permanent injunction. Obviously the relief of permanent injunction would be ineffectual and of no consequence in

the absence of removal of the structures and sheets, and the lock ordered to be removed by way of mandatory injunction. The decree essentially required the respondents to perform an act of removal of encroachment, without which status quo ante is not possible, and the prohibitory injunction cannot be put into operation effectively and fruitfully. In that sense, the relief of permanent injunction is merely a consequential relief and the main relief is in the nature of mandatory injunction. In other words, the decree is essentially for mandatory injunction along with relief of permanent injunction as a consequential relief.

4. Undisputedly, the application for execution of the decree was filed in the year 2002. It is stated that the applicant was in custody during the period from August, 1993 till September, 1999. It is true that the application for execution was accompanied by an application for condonation of delay and the petitioner had prayed for condonation of the delay as the petitioner was in jail from 1993 till 1999.

5. The Article 135 of the Limitation Act, 1963, clearly provides that for enforcement of a decree granting mandatory injunction would be three years from the date of the decree or where the date is fixed for

performance, from such date. It was held by the Allahabad High Court in **Nanwa v. Maulana Abdul Mughni,** reported in AIR 1981 All. 143 that the relief directing the defendant for removal of debris was in the nature of mandatory injunction capable of being executed within three years from the date of decree, in view of Article 135 of the said Act. Similarly, the Orissa High Court in **Ishteyaque Ahamad and another v. Kitawan Bibi and others,** reported in AIR 1985 Orissa 102 held that the execution proceedings filed in 1980 for execution of decree of mandatory injunction in 1970 was clearly barred by limitation under Article 135 of the said Act. Being so, as rightly observed by the trial Court, the provisions of Article 135 of the Limitation Act are attracted and it was necessary for the appellant to file the execution proceedings within three years from the date of the decree by the lower Appellate Court.

6. Bare reading of Section 5 of the Limitation Act would disclose that the provision of the said Act are not applicable to the proceedings under Order 21 of the C.P.C.. In fact, it specifically provides that any appeal or any application, other than an application under any of the provisions of Order 21 of the C.P.C., may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or

making the application within such period. From the said provision and taking into consideration the provision of Article 135 of the Limitation Act, which provides for limitation of three years for execution of the decree for mandatory injunction, the trial Court has rejected the application under Exhibit-48 filed by the petitioner.

7. Since the Legislature in its wisdom has specifically provided under Article 135 of the said Act that the period for execution of the decree for mandatory injunction would be three years and further under Section 5 of the said Act that the provision regarding condonation of delay would not be applicable to the proceedings under Order 21 of the C.P.C., the executing Court was certainly justified in dismissing the application for execution filed by the petitioner almost after expiry of the period of twenty years from the date of decree. Undoubtedly, the period of limitation will have to be counted from the date of the decree of the Appellate Court as, the decree of the trial Court merges with the decree of the Appellate Court. The decree of the Appellate Court was passed on 18-11-1981. The application for execution of the decree was filed in the year 1991 which came to be dismissed in the year 1994. It is said that the petitioner was arrested and convicted for criminal offence under Section 302 of the

I.P.C. and he remained in the jail from 7-8-1993 to 19-9-1999. The present execution application was filed on 5-2-2002. Admittedly, there was delay of more than twenty years in filing the application for execution proceedings. Once the law on the point of non-applicability of Section 5 of the said Act to the execution proceedings being clear, question of condonation of delay in initiating such proceedings does not arise at all. The Legislature in its wisdom having chosen to debar the execution of the relief of mandatory injunction after three years from the date of the decree, and the provisions of Section 5 being made not applicable to such proceedings, it has clearly provided for absence of jurisdiction to the executing Court to entertain such application after the expiry of such period. Being so, no fault can be found with the impugned order as it does not disclose any jurisdictional error on the part of the executing Court in dismissing the application.

8. As already seen above, the impugned decree which was sought to be executed was primarily for mandatory injunction and therefore the finding arrived at by the executing Court that the execution application for such a decree ought to have made within three years in terms of Article 135 of the Limitation Act cannot be found fault with. Hence, there is no case for interference in

the impugned order and therefore the petition fails and is hereby dismissed. No order as to costs.

(R.M.S. Khandeparkar, J.)

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